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No. 82-2120

In The

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et. al., *Petitioners,*

v.

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether plaintiffs who are granted relief afforded by the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401 *et. seq.*, are entitled to an award of attorneys fees under the Rehabilitation Act of 1973, as amended, where the plaintiffs could not have prevailed on the Rehabilitation Act claim alleged.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Interest of Amicus Curiae	2
Statutes Involved	3
Statement of the Case	4
Summary of Argument	7
Argument	
A. Introduction	10
B. The Relationship Between Rehabilitation Act And EAHCA	11
C. Petitioners could not have prevailed on their § 504 claim, thus, they are not entitled to attorneys' fees.	16
Conclusion	22
Appendix	App. 1

TABLE OF AUTHORITIES

CASES:	Page
Alyeska Pipeline Service Co. v. Wilderness Society (1975), 421 U.S. 240	10, 15
Camenish v. Univ. of Texas (5th Cir. 1980), 616 F.2d 127, *vacated as moot*, 451 U.S. 390 (1981)	20
Cherry v. Mathews (D.D.C. 1976), 419 F.Supp. 922	11, 14, 15
Colin K. By John K. v. Schmidt (1st Cir. 1983), 715 F.2d 1	10, 15, 20
Consolidated Rail Corporation v. Darrone, U.S. No. 82-862 (argued November 29, 1983)	10
Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y. (1983), —— U.S. ——, 103 S.Ct. 3221	10
Hawaii Dept. of Education v. Katherine D. (9th Cir., filed November 7, 1983), —— F.2d ——	10
Hendrick Hudson Dist. Bd. of Ed. v. Rowley (1982), 458 U.S. 176	passim
Hensley v. Eckerhart (1983), —— U.S. ——, 103 S.Ct. 1933	10
Hines v. Pitt County Bd. of Ed. (E.D. N.Car. 1980), 497 F.Supp. 403	16
Hymes v. Hartnett County Board of Education (4th Cir. 1981), 664 F.2d 410	14
In the Matter of J.J. (D.C. 1981), 431 A.2d 587	2
Johnson v. District of Columbia Bd. of Education (D.C. Cir.) U.S. App. Nos. 82-1209, 82-1702	2, 14
Kruelle v. New Castle County Sch. Dist. (3d Cir. 1981), 642 F.2d 687	16, 20
Lee v. Southern Home Sites Corp. (5th Cir. 1971), 444 F.2d 143	10

TABLE OF AUTHORITIES—Continued

CASES:	Page
McInnis v. Shapiro (N.D. Ill. 1968), 293 F.Supp. 327, *aff'd sub nom* McInnis v. Ogilvie (1969), 394 U.S. 322	21
Maher v. Gagne (1980), 448 U.S. 122	8, 17, 18
Middlesex County Sewage Authority v. Sea Clammers Association (1981), 453 U.S. 1	10
Mills v. Board of Education of District of Columbia (D.D.C. 1972), 348 F.Supp. 866	12
Monahan v. Nebraska (7th Cir. 1981), 687 F.2d 1164	15
Morales v. Haines (7th Cir. 1973), 486 F.2d 880	10, 17
New York State Ass'n For Retarded Children v. Carey (2d Cir. 1979), 612 F.2d 644	20
PARC v. Commonwealth of Pennsylvania (E.D. Pa. 1971), 334 F.Supp. 1257, *modified* 343 F.Supp. 279	12
Patsel v. District of Columbia Bd. of Ed. (D.D.C. 1982), 530 F.Supp. 660	14
Pinkerton v. Moye (W.D. Va. 1981), 509 F.Supp. 107	16, 20
Quackenbush v. Johnson City School Dist. (2d Cir. 1983), 716 F.2d 141	10
Riley v. Ambach (2d Cir. 1981), 668 F.2d 635	14
Rollison v. Biggs (D. Del. 1983), 567 F. Supp. 964	15, 20
San Antonio Independent School Dist. v. Rodriguez (1973), 411 U.S. 1	16, 21
Simon v. St. Louis County, Missouri (8th Cir. 1981), 656 F.2d 316	20
Smith v. Cumberland School Committee (1st Cir. 1983), 703 F.2d 4	1, 7

TABLE OF AUTHORITIES—Continued

	Page
CASES:	
Smith v. Cumberland Sch. Committee (R.I. 1980), 415 A.2d 168	4, 5
Southeastern Community College v. Davis (1979), 442 U.S. 397	passim
S-1 v. Turlington (5th Cir. 1981), 634 F.2d 342, *cert. denied*, 454 U.S. 1030 (1981)	20
Tatro v. Texas (5th Cir. 1980), 625 F.2d 557	20
Tatro v. State of Texas (N.D. Texas 1981), 516 F.Supp. 968, *aff'd* 703 F.2d 823 (5th Cir.), *cert. granted sub nom* Irving Independent School District v. Tatro, U.S. No. 83-558, 52 U.S.L.W. 3435 (December 6, 1983)	20,21
Timms v. Metropolitan Sch. Dist. of Wabash City (7th Cir. 1983), 718 F.2d 212	10
Turillo v. Tyson (D.R.I. 1982), 535 F.Supp. 577	14, 16, 17, 18, 20
University of Texas v. Camenisch (1981), 451 U.S. 390	15
William S. v. Gill (N.D. Ill. 1983), 572 F.Supp. 509	20
STATUTES:	
UNITED STATES CODE CITED, 1976:	
Title 20, Sections 1401 et seq.	8, 12
Title 20, Sections 1401 (16)-(19)	12
Title 20, Section 1411	12
Title 20, Section 1412(1)	12
Title 20, Section 2411(a)(5)	14
Title 20, Sections 2701 et. seq. (Supp. III 1979)	14
Title 29, Section 794	passim
Title 29, Section 794a(b) (Supp. III 1979)	passim
Title 42, Section 1983	6, 7
Title 42, Section 1988	passim

TABLE OF AUTHORITIES—Continued

	Page
CODE OF FEDERAL REGULATIONS CITED, 1981:	
34 C.F.R. § 104.36	15
45 C.F.R. Subtitle A, Appendix A	14
45 C.F.R. § 84.33(a)	15
45 C.F.R. § 84.33(b)(2)	15
45 C.F.R. § 84.36	15
OTHER AUTHORITIES CITED:	
H.R. Rep. No. 1588, 94th Cong., 2d Sess. (1976)	8, 17
H.R. Rep. No. 94-332, 94th Cong., 1st Sess. (1975)	12
124 Cong. Rec. 30346 (1978)	17
124 Cong. Rec. 37507-37508 (1978)	17
Note, *Enforcing the Right to An "Appropriate" Education: the Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103 (1979)	12
Rhode Island General Laws § 16-24-1	5

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OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported at 703 F.2d 4 and is attached to the Petition for Certiorari as Appendix A. That decision reversed the order of the United States District Court for the District of Rhode Island awarding attorneys' fees. That order is unreported; a copy is attached to the Petition for Certiorari as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 24, 1983 (Appendix A, at A-1, attached to the Petition for Certiorari). The jurisdiction of this Court was invoked by petitioners under 28 U.S.C. §1254(1).

INTEREST OF THE AMICUS CURIAE

The District of Columbia, by and through the Corporation Counsel, respectfully presents this brief as *amicus curiae*, in support of respondents in this case.

This Court made it clear, in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 202-208 (1982), that state and local educational agencies, under the EAHCA, have special competence to deal with special education within established administrative procedures. In light of its experience with the EAHCA, the District of Columbia believes that the provision of fees for EAHCA claims, as opposed to Rehabilitation Act claims for discrimination under §504, would foster a disregard for the administrative process established under the EAHCA. That has in fact occurred in the District of Columbia.[1] Thus, the District of Columbia has a substantial interest in this matter.

In its brief, the District of Columbia has limited its discussion to the validity of petitioners' claim for attorneys' fees under the Rehabilitation Act. Neither of the courts below focused on the attorneys' fee claim under the Rehabilitation

[1] See e.g., *Johnson* v. *District of Columbia Bd. of Ed.*, U.S. App. No. 82-1209 (D.C. Cir., argued January 26, 1983). There the plaintiff refused to enroll her child in a proposed placement at a special education learning center and requested an administrative review of her child's education program. On the eve of the administrative hearing, however, the plaintiff withdrew her request for an administrative review because she had in the meantime persuaded the Superior Court of the District of Columbia, in a delinquency proceeding, to place her child at a residential facility chosen by her. The District of Columbia Court of Appeals stayed the Superior Court's order and ultimately reversed it. *In the Matter of J.J.*, 431 A.2d 587 (D.C. 1981). Instead of returning to the administrative process, plaintiffs then filed suit in the United States District Court and obtained a preliminary injunction directing the Board of Education to finance the private placement. Almost 2 years later, the district court, without ever deciding the merits of any claim, awarded attorney's fees as its "final" order in the case.

The *Johnson* case is by no means the only case in which counsel has attempted to bypass the administrative process in favor of the courts, apparently in part because of the opportunity to recover fees.

Act. Thus, the Circuit merely incorporated its discussion of 42 U.S.C. §1988 in ruling on the availability of attorneys' fees under the Rehabilitation Act. However, the briefs filed by *amici curiae* have focused on the availability of fees under the Rehabilitation Act, and all of the District's pending litigation regarding attorneys' fees involves awards of attorneys' fees under the Rehabilitation Act rather than 42 U.S.C. §1988. Accordingly, the District of Columbia has a substantial and continuing interest in the entitlement to attorneys' fees under the Rehabilitation Act for EAHCA claims.

STATUTES INVOLVED

Section 504 of the Rehabilitation Act, 29 U.S.C. §794, provides, in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b), which was added to the Rehabilitation Act through amendments enacted in 1978, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioners seek reversal of the First Circuit's decision denying them any attorneys fees under either the Civil Rights Attorney's Fees Awards Act., 42 U.S.C. §1988, or the Rehabilitation Act., 29 U.S.C. §794a(b). The undisputed facts pertinent to the Rehabilitation Act issue are as follows.

Petitioner, Thomas Smith, is a physically and emotionally handicapped child. He "has a long history of being unable to fit into the educational environment provided for him * * * [, and] walks with the aid of leg braces and crutches due to problems created by cerebral palsy * * *." J.A. 33. In December 1975, he was enrolled in the Day Hospital Program at Emma Pendleton Bradley Hospital, a private facility. J.A. 33.[2] For almost a year tuition was partially funded by the Cumberland School Committee until, in November 1976, the superintendent of schools informed petitioners that the Department of Mental Health, Retardation and Hospitals (MHRH), rather than the school committee, was responsible for funding the placement at that private facility. J.A. 130. As a result it was likely that, because of MHRH's limited funds, Thomas would have to go onto a waiting list before his placement could be funded. This decision was upheld by the school committee and by the associate commissioner of education. J.A. 131. The associate commissioner, however, held that the school committee did have to "contribute * * * the 'per pupil cost' as its share of the services provided to Thomas." *Id.*; *Smith* v. *Cumberland Sch. Committee*, 415 A.2d 168, 171 (R.I. 1980).

Petitioners sought relief in the local Family Court and, when their petition was dismissed, in Superior Court. That

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[2]The annual tuition was $18,000 (J.A. 130), or double the per pupil cost for educating other children. J.A. 68. There is no dispute that the facility was providing Thomas with an "appropriate education", and that regular programs in the Cumberland school system in the school district, where he and his parents resided, could not meet his educational needs.

action was also dismissed. Thus, on November 26, 1976, petitioners brought suit in the United States District Court for the District of Rhode Island seeking an order compelling the school committee to continue funding Thomas' special education at Bradley Hospital. J.A. 132. In their first amended complaint, petitioners argued that the school committee's actions violated the fourteenth amendment to the Constitution of the United States and the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§1401 *et seq.* J.A. 49-64.

On December 28, 1978, the district court certified to the Rhode Island Supreme Court the question regarding whether the school committee or the MHRH was responsible for funding Thomas' education at Bradley Hospital. J.A. 108-123. In its June 3, 1980 decision, the Rhode Island Supreme Court noted that, under state law,[3] "a school committee has an affirmative obligation to provide the type of special education that will best satisfy the needs of a resident handicapped child whose * * * handicap prevent his normal educational growth and development." J.A. 133-134; *Smith* v. *Cumberland Sch. Committee, supra* 415 A.2d at 171-172. The court further construed §16-24-1 as providing for the responsibilities of the Rhode Island Board of Regents for Education under the EAHCA. The court then reviewed the different and complementary obligations of the school committee, the Board of Regents and the MHRH, and held that (1), in the first instance, the school committee is "obligated to finance a handicapped child's special education in a private program" and (2) MHRH's obligation "arises when the services that the school committee must provide are no longer accessible to an emotionally disturbed child as a consequence of the 'psychiatric care and treatment' he is receiving in the MHRH program." J.A. 142-143; 415 A.2d at 174. That is, if the MHRH program of treatment

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[3] R.I.G.L. S. §16-24-1.

precludes a child from participating in the newly established public program created, or private program utilized, by the school committee for the child, then the MHRH must educate the child. Thus, the MHRH does not have the responsibility of educating all emotionally handicapped children, but, the Rhode Island Supreme Court said, under state law, the school committee had that obligation with respect to Thomas and that was consistent with its responsibilities under the EAHCA.

Three months after the Rhode Island Supreme Court resolved the issue on which petitioners had originally filed suit in federal court—namely, which agency should pay for Thomas' special education—on September 16, 1980, petitioners filed a second amended and supplemental complaint. J.A. 152. In that pleading, petitioners for the first time alleged that the school committee had violated §504 of the Rehabilitation Act, 29 U.S.C. §794. J.A. 165. In support of that allegation, petitioners asserted that the school committee had discriminated against Thomas in contrast to other handicapped children, on the basis of his emotional handicap, when, solely on the basis of fiscal considerations, it "misinterpret[ed] * * * Rhode Island and federal law" and decided that the MHRH had the responsibility for educating Thomas. J.A. 166-167. Petitioners sought permanent injunctive relief.[4]

In its memorandum and order of June 4, 1981 denying respondents' motion to dismiss, the district court found it unnecessary to decide whether petitioners had a cause of action under §504 of the Rehabilitation Act. J.A. 178.[5] The court held that, on the basis of its earlier January 17, 1977 opinion, petitioners had a cause of action under §42 U.S.C. §1983. J.A. 178-179. The court concluded that petitioners

[4]Petitioners did not seek attorneys' fees under §505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b), but only under 42 U.S.C. §1988. J.A. 168.

[5]The district court later stated that the §504 claim, filed after the Rhode Island Supreme Court decision, had become moot by that decision. A. 34.

were entitled to a permanent injunction on the basis of the decision of the Rhode Island Supreme Court. A. 5, 29. The First Circuit affirmed. A. 5, 29-30; J.A. 172.

Petitioners then sought attorneys' fees. The district court held that petitioners were entitled to attorneys' fees on their §1983 claim for the administrative proceedings held under the EAHCA[6] and the judicial proceedings which resolved petitioners' state law claim. A. 40-41. The First Circuit reversed the award of attorneys' fees. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983).

As to the Rehabilitation Act, the First Circuit, while expressing doubt that a private action under §504 existed, did not decide that issue, but nevertheless held that attorneys' fees were unavailable under 29 U.S.C. §794a(b). The First Circuit did not decide whether petitioners had a substantial claim under §504, but concluded that, for the same reasons fees could not be awarded under 42 U.S.C. §1988, they could not be awarded under 29 U.S.C. §794a(b): The comprehensive remedial scheme under the EAHCA precludes reference to the general prohibition of §504 of the Rehabilitation Act, 29 U.S.C. §794.

SUMMARY OF ARGUMENT

Petitioners in this case sought and obtained from a local school district funds to pay for the education of an emotionally and physically handicapped child, who could not receive an appropriate education in the school district's own facilities, at an expensive private educational institution. They seek attorneys' fees under the authority of, *inter alia*, the Rehabilitation Act, 29 U.S.C. §§794 *et seq.*, which, in §504, prohibits discrimination against handicapped indi-

[6] While the proceedings were pending in the district court, and after petitioners amended their complaint to include an EAHCA claim, petitioners were ordered to exhaust their EAHCA administrative remedies. J.A. 30-48.

viduals. They are not entitled to fees under the Rehabilitation Act, however, since it is clear that they had no §504 claim.

Petitioners obtained relief under state law, and both courts below treated them as though they had prevailed under the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§1401 *et seq.* The EAHCA, however, does not authorize awards of attorneys fees. The Rehabilitation Act does authorize such fee awards; however, petitioners did not obtain a ruling in their favor under §504.

A party who sought relief under both the Rehabilitation Act and under another statute which does not authorize fees, and has prevailed under the non-fee statute, is entitled to attorneys' fees under the Rehabilitation Act only if it is clear that he would have prevailed under his §504 claim. The attorneys fee provision of the Rehabilitation Act is modeled on the Civil Rights Attorney's Fee Award Act of 1976, 90 Stat. 2641 (1976), codified in 42 U.S.C. §1988. The legislative history of §1988 shows that Congress intended that, where a party prevailed on a non-fee statute, he could obtain fees under §1988 only where there was a favorable "determination on the other [fee] claim for the purpose of awarding counsel fees". H.R. Rep. No. 1588, 94th Cong., 2d Sess. (1976) at 4, n.7. Furthermore, the rationale of *Maher* v. *Gagne*, 448 U.S. 122 (1980) does not apply where no constitutional claim is involved. *Maher* permits recovery of attorneys' fee under §1988 where a party has prevailed under a non-fee statute if that party had a "substantial" constitutional claim for which fees could be awarded under §1988. However, *Maher's* ruling that only a "substantial" constitutional claim need be shown is based on the policy of avoiding unnecessary constitutional rulings, a policy which has no application in a purely statutory context. Therefore, the relevant legislative history shows that fees are awardable under the Rehabilitation Act only when it is clear that a party would have prevailed on his or her §504 claim and there are no policy considerations to the contrary.

Petitioners here, however, could not even show that they had a "substantial" claim under §504. For, their claim was clearly precluded by *Southeastern Community College* v. *Davis*, 422 U.S. 397 (1979). That case holds that §504 does not require educational institutions to make substantial modifications to their existing programs to accommodate a handicapped person. The school district here could not accommodate the child in question in its existing programs; it could obtain an appropriate education for him only by funding his education in a special private facility at a cost of $18,000 per year. To require the school system to do so would require it to create a private supplement to its existing system at substantial cost. That constitutes a "substantial modification" within the clear meaning of *Southeastern Community College*, *supra*.

That conclusion is buttressed by the reasoning in *Southeastern Community College* that §504 is not an affirmative action statute. Petitioners' argument—essentially that the needs of the child in question here must be accommodated at whatever cost—unquestionably invokes affirmative action principles, which *Southeastern Community College* makes clear do not inhere in §504. Indeed, it is not even clear that the EAHCA requires quite the sort of affirmative action for which petitioners contend. See *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176 (1982).

Petitioners have attempted to avoid the impact of *Southeastern Community College*, *supra*, by arguing, *inter alia*, that the policy involved here was discriminatory because it treated the child in question here less advantageously than other handicapped children. They also argue that the policy in question here violates the Equal Protection Clause and therefore must violate §504. However, *Rowley* disposes of both arguments. It rejects that notion that all handicapped individuals must be treated the same. It also rejects the notion that the Equal Protection Clause requires absolute equality of educational opportunity regardless of cost.

Since petitioners clearly had no §504 claim, they were not entitled to attorneys' fees under the Rehabilitation Act.

ARGUMENT

A. INTRODUCTION

This Court has made it quite clear that, except in limited circumstances not present here, attorneys' fees are awardable to a prevailing plaintiff only where expressly provided for by statute. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). See also *Hensley* v. *Eckerhart*, ——U.S. ——, ——, 103 S. Ct. 1933, 1937 (1983). Attorneys' fees are not available merely because providing them serves important policies, or even where providing them would serve policies similar to those also served by statutes which expressly provide for the award of attorneys' fees. Thus, in *Alyeska*, *supra* 421 U.S. at 270, n.46, the Court specifically disapproved of cases which had awarded attorneys' fees on such theories. E.g., *Morales* v. *Haines*, 486 F.2d 880 (7th Cir. 1973); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). The principles recognized in *Alyeska* are critical here because, while petitioners' amended complaints alleged violations of both the Rehabilitation Act and the EAHCA, only one of those statutes, namely the Rehabilitation Act, provides attorneys' fees.[7] And, as we show below,

[7] We do not address in this brief petitioners' §1988 claim although we believe that there is adequate support in the decisions of this Court, and other courts, for the First Circuit's ruling regarding the nonavailability of attorneys' fees under 42 U.S.C. §1988. See e.g. *Guardians Ass'n* v. *Civ. Serv. Com'n of City of N.Y.*, —— U.S. ——, ——, n.3, 103 S. Ct. 3221, 3236, n.3 (1983) (Powell, J., concurring); *Middlesex County Sewage Authority* v. *National Sea Clammers Ass'n.*, 453 U.S. 1, 20-21 (1981); *Hawaii Dept. of Education* v. *Katherine D.*, —— F.2d —— (9th Cir., filed November 7, 1983) *Timms* v. *Metropolitan Sch. Dist., of Wabash City*, 718 F.2d 212, 217 (7th Cir. 1983); *Quackenbush* v. *Johnson City School Dist.*, 716 F.2d 141, 150-152 (2d Cir. 1983) (Weis, J., dissenting); *Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 8-10 (1st Cir. 1983).

We assume, unless this Court should decide otherwise in *Consolidated Rail Corporation* v. *Darrone*, U.S. No. 82-862 (argued November 29, 1983), that there exists a private cause of action under §504 of the Rehabilitation Act.

the relief obtained here could not properly be granted under the Rehabilitation Act. Thus, the First Circuit was correct when it held that petitioners could not obtain attorneys' fees under the Rehabilitation Act.* In light of the Court's decisions in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176 (1982) and *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), it is plain that, while respondents conduct here may not have met their responsibilities under the EAHCA, it clearly did not violate the Rehabilitation Act.

B. The Relationship Between Rehabilitation Act And EAHCA

The Rehabilitation Act was enacted in 1973. Pub. L. 93-112, 87 Stat. 394, 1973 U.S. Code Cong. and Adm. News, p. 2076. Pursuant to §504 of the Act, discrimination on the basis of handicap is prohibited in federally funded programs. Thus, §504 provides that

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *. [29 U.S.C. 794]

Subsequently, as a result of a District Court order in *Cherry* v. *Mathews*, 419 F.Supp. 922 (D.D.C. 1976), the then-United

*Petitioners and *amici* argue that a substantial §504 claim was presented below and thus they were entitled to attorneys' fees. The First Circuit did not resolve that issue nor did it assume that a substantial claim existed. Instead, it held that no attorneys' fees could be awarded because the EAHCA provided the exclusive avenue of relief for petitioners in any proceeding in which a child is seeking a "free and appropriate education." This Court need not decide whether the EAHCA provides the exclusive avenue of relief because, as we show below, petitioners could not obtain attorneys' fees under the Rehabilitation Act. This is because (1) they could not prevail on their §504 claim and (2) they did not even present a substantial §504 claim. See *infra* at 16-22.

States Department of Health, Education and Welfare promulgated regulations that provided for an administrative mechanism to enforce §504. See 42 Federal Register 22677 (May 4, 1977).

Congress enacted the EAHCA in 1975. Pub L. 94-142, 89 Stat. 775, 1975 U.S. Code Cong. and Adm. News, P. 1425, codified at 20 U.S.C. §§1401 *et seq.* (1976). The EAHCA was enacted as result of District Court decisions—see *Mills* v. *Board of Education of District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972); *PARC* v. *Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F.Supp. 279 (E.D. Pa. 1972)—recognizing the right of handicapped children to receive the benefits of a public education. See Note, *Enforcing the Right to An "Appropriate Education: the Education for All Handicapped Chidren Act of 1975*, 92 Harv. L. Rev. 1103 (1979).[9] The EAHCA narrowly focused on education. Moreover, it is a statutory mechanism for providing substantial amounts of federal money to states to assist them and local educational agencies in furnishing educational services to handicapped children. 20 U.S.C. §1411. However, such assistance is conditioned by a requirement that each state ensure that all handicapped children are provided with a free appropriate public education designed to meet their "unique needs". 20 U.S.C. §§1401(16)(17)(18) and (19) and 1412(1). This Court in *Rowley*, *supra* 458 U.S. at 198, stated that states are not required to provide 'equal' educational opportunities [since that] would * * * present an entirely unworkable standard requiring impossible measurements and comparisons." Rather, in providing access to public education, Congress merely in-

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[9] Although the Rehabilitation Act had been passed two years earlier, "[i]n explaining the need for federal legislation [namely, the EAHCA], the House Report noted that 'no congressional legislation has required a precise guarantee for handicapped children'" to equal access to a public education. *Rowley*, *supra* 458 U.S. at 200, quoting H.R. Rep. No. 94-332, 94th. Cong., 1st Sess. (1975) at 14.

tended that the education provided "be sufficient to confer some educational benefit." *Id.* at 200.[10]

The EAHCA also establishes procedures to ensure that a free appropriate education is provided each handicapped child which are intended to encourage resolution of a disputes at the local level. In outline,

> Parents are given the right to be involved in the initial determination of an individualized educational program for their handicapped child. 20 U.S.C. §1415(b)(1)(A). The school system must give the parents prior notice of any change in the child's educational placement, 20 U.S.C. §1415(b)(1)(C), and must be given an opportunity to present complaints to the school authorities. 20 U.S.C. §1415(b)(1)(E). If the parents are not satisfied with the school's response, they are entitled to a due process hearing before an impartial hearing officer. 20 U.S.C. §1415(b)(2). If the hearing is held by the local educational agency or an intermediate educational unit, the aggrieved party may appeal to the State educational agency. 20 U.S.C. §1415(c). After a decision by the State agency, an aggrieved party may bring an action in federal district court. 20 U.S.C. §1415(e)(2). These procedures are elaborated in regulations, 45 C.F.R. Part 121a, required by statute. 20 U.S.C. §1417(b).
>
> The States are also commanded to file plans detailing their compliance with the EAHCA, 20 U.S.C. §1413, and the Commissioner of Education must find that the plans comply with the statute. 20 U.S.C. §1412. If a State fails to comply, the Commissioner is authorized to withhold federal funds from the State educational agency. 20 U.S.C. §1416. The State may bring an action challenging this decision in the court of appeals for the circuit in which the State is located. 29 U.S.C. §1416(b).

[10] In the District of Columbia, providing access to a public education for handicapped children in need of a private placement entails a considerable expenditure of funds. Thus, in 1980, 240-260 handicapped children were provided services in private residential settings. The average cost of providing such services for a student for one year was $20,392.05. The maximum cost for providing educational services in the

[Footnote continued on next page]

Turillo v. *Tyson*, 535 F.Supp. 577, 581 (D.R.I. 1982). These procedures must be exhausted prior to filing an action under the EAHCA in district court, unless recourse to them would be futile. See *Riley* v. *Ambach*, 668 F.2d 635 (2d Cir. 1981). As indicated, the EAHCA does not provide for attorney's fees awards to prevailing parties. *Hymes* v. *Hartnett County Board of Education*, 664 F.2d 410, 412 (4th Cir. 1981).

After the enactment of the EAHCA in 1975, in response to the decision in *Cherry* v. *Mathews*, *supra*, HEW promulgated regulations to effectuate the provisions of the Rehabilitation Act. At the time that the Rehabilitation Act regulations were in their "final stages of preparation", EAHCA regulations were also prepared. See *Patsel* v. *District of Columbia Bd. of Ed.*, 530 F.Supp. 664 (D.D C. 1982). HEW attempted to make the two sets of regulations consistent with each other. Thus, in the Rehabilitation Act regulations concerning education, HEW used concepts imported from the EAHCA. See 45 C.F.R. Subtitle A, Appendix A at 299-302 (1981). The regulations applicable to preschool, elementary, and secondary education provide that recipients of federal assistance must "provide a free appropriate public education to each qualified handicapped

[10]continued from preceding page
public schools for non-handicapped students was $2,300, and for handicapped children was $6,456. More than $5.3 million was spent on providing services in a private residential setting.

Of the $5.3 million spent, the District of Columbia, received no reimbursements under the EAHCA for the more than 240 private placements, although it received approximately $200,000 for administrative expenses occasioned by general compliance with the EAHCA. The District was reimbursed for special education (provided to the approximately 2,500 children who are not in private facilities), in the sum of $786,280 in FY 1980.

Under the Elementary and Secondary Education Act of 1965, Pub. L. 89-313, 79 Stat. 1161, codified at 20 U.S.C. §2411(a)(5) (1976), repealed in part and amended in part by the Education Amendments of 1978, Pub. L. 95-561, Title 1, codified at 20 U.S.C. §§2701 *et seq.*, the District received $731.83 per placement in 1981. Using 1980 rates, therefore, the average cost for handicapped children in private facilities minus federal reimbursement in 1981 was $19,660.22 ($20,392.05 minus $731.83). See supplemental memorandum submitted in *Johnson et al.* v. *District of Columbia Bd. of Educ., et al.*, U.S. App. Nos. 82-1209, 82-1702, (D.C. Cir.) attached hereto as an Appendix.

person." 45 C.F.R. §84.33(a)(1981). Furthermore, the regulations provide that development of an Individualized Education Program (IEP), in accordance with the EAHCA, is one means by which a recipient may meet its responsibilities under the Rehabilitation Act. 45 C.F.R. §84.33(b)(2). In addition, the regulations provide that compliance with the procedural safeguards of §615 of the EAHCA also satisfies a recipient's obligations to establish procedures for the identification, evaluation, and education of handicapped children. See 45 C.F.R. §84.36 (1981). See also 34 C.F.R. §104.36 (1981).[11]

In 1978 Congress amended the Rehabilitation Act to provide that

> [i]n any action or proceeding to enforce or charge a violation of a provision of this title [29 U.S.C. §791 *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

§505(b) of the Comprehensive Rehabilitation Services Amendment Act of 1978, §120 of Pub. L. 95-602, 92 Stat. 2982, 1978 U.S. Code Cong. and Adm. News, p. 7312, codified as 29 U.S.C. §794a(b) (Supp. III 1979). However, as already stated, the EAHCA did not, and does not, provide for such awards. Accordingly, under *Alyeska*, in order for petitioners to be entitled to attorneys' fees, it is not sufficient for them to establish that their rights under the EAHCA have been violated; they must establish that their rights

[11] The validity of the Rehabilitation Act regulations is doubtful, for in *Southeastern Community College* v. *Davis*, *supra* 442 U.S. at 410-412 n.11, the Court has made it clear that the substantive provisions, insofar as they import concepts from the EAHCA, are largely invalid. See also, *Colin K. By John K.* v. *Schmidt*, *supra*, 715 F.2d at 9. See *Monahan* v. *Nebraska*, 687 F.2d 1164, 1169-1170 (8th Cir. 1982). "The regulations cannot grant more than that which Congress intended in enacting section 504." *Rollison* v. *Biggs*, 567 F.Supp. 964, 969 n.8 (D. Del. 1983).

The Court noted in *Southeastern* that, in any event, because HEW's position had been that Congress intended no regulations to implement the Rehabilitation Act until *Cherry* v. *Mathews*, *supra*, ordered otherwise, the deference to be given the interpretation of §504 by HEW (now the Department of Health and Human Services) is substantially diminished. 442 U.S. at 412, n. 11. See also *University of Texas* v. *Camenisch*, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring).

under the Rehabilitation Act have been violated.[12] See *Turillo* v. *Tyson*, *supra* 535 F.Supp. at 585-588 (No fees awarded because only EAHCA violation and no Rehabilitation Act violation found); *Hines* v. *Pitt County Bd. of Ed.*, 497 F.Supp. 403, 409 (E.D. N. Car. 1980) (No attorney fees awarded because relief awarded only under EAHCA and not Rehabilitation Act). Cf. *Kruelle* v. *New Castle County Sch. Dist.*, 642 F.2d 687, 695 (3rd Cir., 1981) (Relief awarded appropriate only under EAHCA and not under Rehabilitation Act); *Pinkerton* v. *Moye*, 509 F. Supp. 107, 114 (W.D. Va. 1981).

C. Petitioners could not have prevailed on their §504 claim, thus, they are not entitled to attorneys' fees.

To obtain attorneys' fees under the Rehabilitation Act, where a party prevails under a non-fee statutory claim, the party must show that he or she would have prevailed under the Rehabilitation Act claim. It not enough that a "substantial" Rehabilitation Act claim has been alleged. However, even if it were, it is clear here that under this Court's decisions in *Southeastern Community College* v. *Davis*, *Rowley*, and *San Antonio Independent Sch. Dist.* v. *Rodriquez*, 411 U.S. 1 (1973), no substantial claim was presented.

The provision for recovery of attorneys' fees in the Rehabilitation Act, 29 U.S.C. §794a(b), was authored by Senator Cranston who stated that attorneys' fees were intended to provide for the private enforcement of

[12] In their *amicus* brief, the Association for Children and Adults with Learning Disabilities argue that §504 of the Rehabilitation Act provides for the same substantive rights as the EAHCA, namely, the right to a "free and appropriate education." Thus, in the Association's opinion, a violation of the EAHCA is *ipso facto* a violation of the Rehabilitation Act because, under §504, school districts have an affirmative obligation to provide "meaningful" special education programs at either a public or private school. To accept this argument this Court would have to overrule its decision in *Southeastern Community College* v. *Davis*, *supra*. The Association presents no basis for doing so. Indeed, in its brief filed on behalf of numerous *amici*, the Education Law Center recognizes that EAHCA claims are not necessarily §504 claims. *Amici* Brief at 14-15.

> rights extended to handicapped individuals of title V of the Rehabilitation Act of 1973—Federal Government employment, *physical accessibility* in public buildings, employment under Federal contracts, *and non-discrimination* under Federal grants * * *.

124 Cong. Rec. 30346 (September 20, 1978. (Remarks of Senator Cranston) (emphasis supplied). In construing §794a(b), Senators Cranston and Stafford noted that "the legislative history and expressions of legislative intent with respect to" the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, should be considered. *Id.*; 124 Cong. Rec. 3707-37508 (1978). In the legislative history of §1988, where Congress addressed the situation here—that is, where a non-fee claim is joined with a fee-generating non-constitutional statutory claim—Congress indicated that a determination on the merits of the fee-generating statute should be required to authorize fees. It did that when it stated (H.R. Rep. No. 1588, 94th Cong., 2d Sess. (1976) at 4, n.7):

> [t]o the extent a plaintiff joins a claim with one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, *if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. Morales* v. *Haines*, 486 F.2d 880 (7th Cir. 1980). [emphasis supplied]

Petitioners argue that the rationale of *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980) requires a conclusion here that it is sufficient for attorneys' fees to be awarded if there is a "substantial question" under the fee-generating statute. However, the rationale of *Maher* does not apply here. As stated by the court in *Turillo* v. *Tyson*, *supra* 535 F.Supp. at 506, n.12: "The rationale for requiring nothing more than a non-frivolous constitutional claim is the well-established reluctance of courts to decide constitutional questions when statutory grounds are dispositive. * * * This rational does not apply to non-constitutional claims." Since the legis-

lative history quoted above indicates that "there must be a determination" on the fee-generating claim, and the policy considerations underlying *Maher* do not dictate otherwise, it seems clear that, in order to obtain fees under the Rehabilitation Act, a party must show that he would have prevailed under the statute, and not merely that his claim stated a substantial question thereunder. However, under this Court's holding in *Southeastern Community College* v. *Davis*, *supra*, particularly when read in light of *Rowley*, it is clear that plaintiffs could not have established any claim under §504. Therefore, no attorneys' fees could be awarded them in any event.[13]

This Court made it plain in *Southeastern Community College* v. *Davis*, *supra*, that the Rehabilitation Act requires only the elimination of discrimination against the handicapped; it is not an affirmative action statute requiring that recipients of federal aid take whatever steps might be necessary to provide the handicapped with an education suited to their special needs. Specifically, the Court held that the Rehabilitation Act did not require a school to make major adjustments in a program that it already provided to the general student population. That case involved a deaf woman who sought admission to a nursing program at a state college receiving federal funds. The college refused to accept her because permitting her to participate in the nursing program would have required substantial modifications in that program. The Court rejected the woman's contention that §504 required adjustments to the nursing program, stating that

[13] In light of *Turillo* v. *Tyson*, *supra*, it is clear that if it had considered petitioners' §504 claim, the district court would have held that petitioners could not have prevailed on that claim. In *Turillo* the same district court considered a Rhode Island school committee's refusal to pay for a handicapped child's education at Bradley Hospital, the same private facility involved here. The court concluded that no claim under §504 was stated because §504 "never compels a school system to finance a private educational placement." *Id.* at 588. Petitioners' here were seeking under §504 precisely the relief the district court in *Tyson* held was "never compell[ed]" by that statute.

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps.
>
> * * *
>
> *Section 504 does not refer at all to affirmative action, and * * * it does not provide for implementation by administrative action.*
>
> [Moreover] neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.

Id. at 410-411 (footnotes omitted, emphasis added). More specifically, the Court reasoned

> Section 504 by its terms does not compel educational institutions to * * * *make substantial modifications in their programs* to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap" * * *.

Id. at 405. The holding in the case was that "Southeastern's unwillingness to make major adjustments to its nursing program does not constitute such [§504-prohibited] discrimination." *Id.* at 413. The Court further noted that, while

> situations may arise where a refusal to modify an *existing* program might become unreasonable and discriminatory * * * [s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.

Id. at 412-413 (footnote omitted, emphasis added). The Court also made it clear that changes to existing programs were not required where they involved "undue financial and administrative burdens * * *." *Id.* at 412.

Under *Southeastern Community College* v. *Davis*, it is clear that relief could not have awarded under §504 in this case. There was no program offered by the Cumberland public school system that was appropriate for Thomas Smith in light of his severe physical and emotional handicaps. J.A. 33, 130. In order to meet his needs, it was necessary to spend $18,000 per year to educate him in a special private facility. J.A. 130.[14] Thus, in order to provide Thomas Smith with an appropriate education in light of his handicap, the school district would have had to make a modification (i.e. addition) to its existing program which, because of its expense, was plainly substantial. Under *Southeastern Community College*, that could not be required under §504. Indeed, a majority of the federal courts have concluded that §504 "does not obligate a school system to finance a private placement *under any circumstances* * * *." *William S.* v. *Gill*, 572 F.Supp. 509, 517 (N.D. ILL. 1983) (emphasis in original). See *Colin K. By John K* v. *Schmidt*, *supra*; *Kruelle* v. *New Castle County School District*, *supra* 642 F.2d at 695; *Rollison* v. *Biggs*, *supra* 567 F.Supp. at 969; *Turillo* v. *Tyson*, *supra*; *Pinkerton* v. *Moye*, *supra* 509 F.Supp. at 114.[15]

As previously pointed out, *Southeastern Community College* emphasized that the Rehabilitation Act is not an affirmative action statute. Of course, this is in contrast to the

[14] Indeed, the record shows that the facility deemed appropriate for Thomas Smith, cost more than double the per pupil cost of other placements. See J.A. 68.

[15] After *Davis*, the Courts have at most required that, under §504 of the Rehabilitation Act, schools must make reasonable modifications to *existing* programs to accommodate handicapped children. See *S-1* v. *Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980); *Camenisch* v. *Univ. of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390 (1981); *New York State Ass'n For Retarded Children* v. *Carey*, F.2d 644 (2d Cir. 1979). Cf. *Simon* v. *St. Louis County, Missouri*, 656 F.2d 316 (8th Cir. 1981). But cf. *Tatro* v. *State of Texas*, 516 F.Supp. 968, 985 (N.D. Texas 1981), *aff'd* 703 F.2d 823 (5th Cir.), *cert. granted sub nom Irving Independent School District* v. *Tatro*, U.S. No. 83-558, 52 U.S.L.W. 3435 (December 6, 1983).

EAHCA. However, petitioners' argument that §504 required the funding of Thomas' placement at Bradley Hospital is essentially an argument that accommodation must be made to meet his needs, whatever costs that entails. That argument is unquestionably rooted in affirmative action concepts. Yet under *Rowley*, *supra* 453 U.S. at 198, 204, n.26, it is not clear that even the EAHCA goes that far. See *Irving Independent School District* v. *Tatro*, U.S. No. 83-558 (which may resolve that EAHCA issue). *Southeastern Community College v.* Davis, *supra*, leaves no doubt that §504 does not go that far. In short, since petitioners' sought undeniable affirmative action relief, it is clear §504 cannot provide the basis for it.

Petitioners' complaint alleged that there was discrimination prohibited by §504 here because Thomas Smith was disadvantaged "because he has a particular handicapping condition, i.e., emotional disturbance, whereas [the School District] has not discriminated against other children with different handicaps". J.A. 16. It further equated §504 discrimination with conduct which violates the Equal Protection Clause. *Id.* However, the Court squarely rejected the notion that a school district must treat all handicapped children alike in *Rowley*, reasoning

> the requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. [458 U.S. at 198].

Furthermore, in *Rowley* the Court also rejected the notion that the Equal Protection Clause required "absolute equality of opportunity [for the handicapped] regardless of capacity" (*id.* at 199), and specifically noted that

> the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child. *San Antonio Independent School Dist.* v. *Rodriquez*, 411 U.S. 1 (1973); *McInnis v. Shapiro*, 293 F.Supp. 327 (ND Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (1969).

Therefore, the fourteenth amendment cannot require that a jurisdiction provide absolute equality of education opportunity for the handicapped regardless of cost. However, at bottom, that is precisely petitioners' argument. Accordingly, equating prohibited §504 discrimination with denial of equal protection cuts against, rather than for, petitioners here because it is clear that the School Board's conduct here did not violate the Equal Protection Clause.

However analyzed, then, it is plain that petitioners had no §504 claim here. Therefore, §504 could not properly serve as a basis for awarding them attorneys' fees.

CONCLUSION

The decision of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted

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APPENDIX

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 82-1209

JEROME JOHNSON, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

No. 82-1702

RORY CAPELLO, a minor child, by his parents and next friends Dorothea and Olivero, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

Appeal From the United States District Court For The District of Columbia

APPELLANTS' SUPPLEMENTAL MEMORANDUM

In response to this Court's order of February 9, 1983, appellants state as follows:

1. Incremental cost of type of residential placement sought in *Johnson* and *Capello.*[1]

[1] All figures are taken from the affidavit of Douglas M. Jackson, Associate Legal Counsel for the District of Columbia Public School System, attached hereto as Exhibit A.

It should be noted that in computing the incremental costs for Jerome Johnson and Rory Capello we have not compared the costs of educating them at residential facilities with the costs of educating non-handicapped individuals of the same age. The differences would be greater.

a. The incremental cost for Rory Capello

(1) The cost of providing benefits to Rory at the Mamie D. Lee School, where the school system has recommended he be placed, is, for 1982-1983, $4,481.[2]

(2) The cost of providing benefits at the Concord School at which Roy's parents placed him, with the court's subsequent approval:

(A) For 1981-1982

instruction	$ 8,000
room and board	$10,600
speech and therapy	$ 1,320
	$19,000

(B) For 1982-1983 (if appropriate) $23,142.80[3]

(3) Difference in cost between placing Rory at Concord and Mamie D. Lee

(A) 1981-1982: at least $15,438

(B) 1982-1983: $18,661.80

(4) Reimbursement from federal government for placement (see subparagraph 1 c (3) below):

(A) 1981-1982: $731.83

(B) 1982-1983: $733.05

(5) Incremental cost of placing Rory at Concord School:

(A) 1981-1982: are least $14,706.17

(B) 1982-1983: $17,928.75.

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[2] The cost for the year 1981-1982 is not readily available. It is safe to assume, however, that the cost was not greater than for the current year.

[3] Rory is still residing at the Concord School as a result of his commitment under D.C. Code 1981, §§6-1901 *et seq*, See D.C. Super. Ct. No. MR-433-82. Appellants had suggested that he be committed under that statute in the Superior Court when this litigation began in the District Court.

b. The incremental cost for Jerome Johnson

(1) The cost of providing benefits to Jerome for placement at Mt. Pleasant in 1982-1983, as recommended by the school system: $2,719[4]

(2) The cost of providing benefits to Jerome at the New Dominion School, as sought by his mother and approved by the District Court:[4a]

(A) For 1981-1982

instruction	$ 3,968
room and board	$12,289
	$16,257

(B) For 1982-1983: $16,259

(3) Difference in cost between placing Jerome at New Dominion, rather than Mt. Pleasant:

(A) 1981-1982: at least $13,538

(B) 1982-1983: $13,540

(4) Reimbursement from federal government for placement (see subparagraph 1 c (3) below):

(A) 1981-1982: $731.83

(B) 1982-1983: $733.05

(5) Incremental cost of placing Jerome at New Dominion:

(A) 1981-1982: at least $12,806.17

(B) 1982-1983: $12,806.95.

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[4]The cost for 1981-1982 is not readily available. Presumably it was somewhat lower than the cost for 1982-1983. Mt. Pleasant was the recommended placement for Jerome.

[4a]The figures used here from 1982-1983 are solely illustrative since Jerome no longer resides at New Dominion. Jerome's probation expired in November 1980. In January 1982 Jerome left New Dominion.

c. Approximate incremental costs for average residential placements (i.e., placement in non-District of Columbia facilities).

(1) Approximate costs for providing educational services in the District of Columbia schools

(A) Schooling: Non-District residents who are not handicapped are charged the following fees for schooling:

(i) $1,583 for Junior High School

(ii) $1,510 for Senior High School

(iii) $2,300 for vocational training

(B) Handicapped Services: Non-District residents who have the following handicaps are charged the following fees:

(i) $6,456 for students with a physical or severe health related handicap or profoundly mentally retarded

(ii) $3,435 for students who are emotionally handicapped

(iii) $4,481 for students who are mentally retarded but trainable, and

(iv) $2,719 for students who have a learning disability or are educationally retarded.

(2) Average costs for providing services to students placed in private residential facilities:

The most recent figures that are available are for 1980-1981. For that year it was calculated that the average cost of providing such services for a sturdent for one year was $20,392.05 (with a range from $10,000 per pupil per year (e.g. the St. Gertrude School) to $100,000 per pupil per year (e.g. Emma Pendleton Bradley Hospital).[5]

[5]These figures were computed by first computing the cost, at then current (1980) rates, of maintaining for one year all 240 handicapped students that the District of Columbia was, under the EAHCA, then providing with services in a private residential setting as of January 1, 1980, and then adding the projected costs for the additional students who,

(Footnote 5 continued on next page)

(3) Average reimbursement from the federal government

(A) No reimbursements were received by the District of Columbia under the EAHCA for residential placements of handicapped students funded by the District. Under Department of Education regulations, such placements are not considered as having been made by a local educational agency (defined at 45 C.F.R. §121.3 (1976) (20 U.S.C. §1401 (8)). See 34 C.F.R. §300.706(b)(1982); 20 U.S.C. §1411 (c)(1). Reimbursements are also precluded since those children are "counted under section 121 of the Elementary and Secondary Education Act of 1965" as amended. 34 C.F.R. §300.702(a)(3); 20 U.S.C. §1411(a)(5).[6]

(B) The Elementary and Secondary Education Act of 1965, Pub. L. 89-313, 79 Stat. 1161. codified at 20 U.S.C. §241c(a)(5) (1976), repealed in part and amended in part by the Education Amendements of 1978, Pub. L. 95-561, Title 1, codified at 20 U.S.C. §§2701 *et seq.*, provides reimbursement for private residential placements and for children committed to state operated facilities. Under that statute,

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(Footnote 5 continued)

primarily as a result of pending cases, it was anticipated would be placed in a private residential setting.

The anticipated total amounts for all 260 actual and anticipated handicapped students was projected as follows: $3,409,700 (room and board) + $1,754,765 (special education instruction) + $117,768 (health care) + $19,880 (other) = $5,301,933.

[6] Placements in private residential facilities, however, are specifically authorized under EAHCA regulations. See 34 C.F.R. §300.302 (1982).

The District of Columbia, however, has received reimbursements for administrative expenses occassioned by compliance with the EAHCA (at approximately $200,000 per year) and for special education programs provided in public facilities where enrollment in the facility is limited to particular non-"statewide" areas. See 34 C.F.R. §300.706 (a) & (b) (1982). The District was reimbursed for special education (provided to the approximately 2,500 children who are not in residential facilities), per year, the sum of $786,280 in FY 1980, $675,848 in FY 1981, $668,848 in FY 1982, and $668,848 in FY 1983.

the District of Columbia received reimbursements, regardless of the actual costs, in the following amounts:

(i) In 1981: $731.83 per placement

(ii) In 1982: $733.05 per placement

(iii) In 1983: $692 per placement[7]

(4) Average incremental costs for handicapped children

(A) In D.C. facilities: $2,719 - $6,456

(B) In residential facilities: $10,000 - $1000,000 with an average of $20,392.05 (at 1980 rates)

(C) Differences (from the average): from $17,673.05 ($20,392.05 minus $2,719) to $13,936.05 ($20,392.05 minus $6,456)

(D) Minus federal reimbursement:

(i) In 1981 - $16,941.22 to $13,204.22 per placement

(ii) In 1982 - $16,940 to $13,203 per placement

(iii) In 1983 - $16,981.05 to $13,244.05 per placement

1.A. Number of handicapped children for which residential placement can reasonably be expected to be necessary.

In FY 1980, 240 children received residential placements and it was projected that 20 more would be so placed that year.

In FY 1981, an average of 182 children were residing in private residential facilities (high 203, low 172).

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[7] Reimbursement in a given fiscal is for the amount of pupils counted 2 years previously. Thus, in FY 1981, $2,296,513 was provided for 3,138 pupils counted on October 1, 1979; in FY 1982, $2,824,442 was provided for the 3,853 pupils counted on October 1, 1980; and in FY 1983; $2,668,445 has provided for the 3,853 pupils counted on October 1, 1981. Since, in 1980, there were 260 students in residential facilities and the District received $733 per placement, only $190,580 of the more than $2 million received went to reimbursement the District for $5.3 million spent on residential placements. The rest of the funds reimbursed the District for expenses related to educating and caring for committed children and students in non-local programs.

In FY 1982, (as of July 15) 168 students were in private facilities.

In 1983 (as of January 27) 184 children were placed in private residential facilities.

Whether such a placement is necessary, of course, begins with the individualized education program prepared for each handicapped child. Apparently, though, the number of children residing in private residential facilities has stabilized after 1980 as a result of the opening up of new facilities in the District of Columbia.[8]

1.B. The incremental benefits provided handicapped children in residential facilities include room and board, basic medical services, social case work, one-to-one supervision on a 24 hour basis and "indirect services" which includes laundry, recreation and entertainment (over and above physical education normally provided in non-residential facilities). In addition, those related services listed in 34 C.F.R. §300.13 (1982) which are provided in public or private day programs are also benefits provided students in private residential facilities.

* * *

[Other portions of the submission are not relevant here, but the complete Supplemental Memorandum has been lodged with the Clerk of the Court]

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[8]However, this figure may change rapidly in the near future as a result of litigation that has been brought seeking to have children previously committed to Forest Haven placed in private residential facilities under the EAHCA. See, e.g. *Bennett et al.*, v. *D.C. Bd. of Ed.*, Dist. Ct. No. 82-0224.

It should also be noted that since appellants' budget and the reimbursements received have not afforded the District the ability to meet its tuition expenses, the District has sought from Congress supplemental payments in FY 1980 in excess of $800,000 and in FY 1981 in excess of $400.000 to meet those expenses.

APPENDIX

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 82-1209

JEROME JOHNSON, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

No. 82-1702

RORY CAPELLO, a minor child, by his parents and next friends Dorothea and Olivero, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

Appeal From The United States District Court For The District of Columbia

AFFIDAVIT OF DOUGLAS M. JACKSON

District of Columbia, ss:

DOUGLAS M. JACKSON, having been duly sworn on oath, deposes and says:

1. I am Associate Legal Counsel to the Superintendent of the District of Columbia Public Schools. For approximately six years, I have served in that capacity with primary responsibilities for special education matters. I am the author of *The Plan For The Education of Handicapped and Exceptional Children in the District of Columbia*, approved on December 6, 1977, in *Mills* v. *Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).

2. In such capacity, I am familiar with the litigation in the above-consolidated cases, this Court's Order of February 9, 1983, and with the records of the Board of Education, the District of Columbia Public Schools, and to some degree, records of the Department of Human Resources.

3. In reviewing pertinent records in response to the Court's first question in its Order of February 9, 1983, those records revealed that:

a. The cost of Rory Capello's residential placement at the Concord School in 1981 was $19,920 ($8,000 for instruction + $1,320 for speech therapy + $10,600 for room and board). Continued residence at the Concord School for 1982 and 1983 is $23,142.80. The cost of providing benefits to Rory at the Mamie D. Lee School, where it was recommended he be placed, is for 1982-1983, $4,481.00.

b. The cost of Jerome Johnson's residential placement at the New Dominion School in 1981 was $16,257 ($3,968 for instruction + $12,289 for room and board). Continued residence at the New Dominion School for 1982 and 1983 is $16,259.00. The cost of providing benefits to Jerome at the Mt. Pleasant Preparatory Program, where it was recommended he be placed, is for 1982-1983, $2,719.00.

4. The yearly costs stated for Mamie D. Lee amd Mt. Pleasant Preparatory Program are based upon rates approved by the Board of Education pursuant to 31 D. C. Code §§602 *et seq*, and as they appear in Attachment I.

5. Further review reveals that:

a. Handicapped students placed in regional full-time special programs, city-wide special education schools and programs, private day special education schools and programs, and private and public residential facilities and programs (i.e., "state operated" programs) do not generate federal funds under the Education for All Handicapped Children Act of 1975, P.L. 94-142, (EAHCA). Only handicapped students placed in regional part-time,

resource and itinerant special education programs usually located in "regular" schools (i.e., "local" programs) generate EAHCA funds. Under the EAHCA, the District was reimbursed for special education provided approximately 2,500 children in local programs in the sum of $786,280 in FY 1980, $675,848 in FY 1981, $668,848 in FY 1982 and $668,843 in FY 1983. Of that amount, up to $200,000 per year is allowed by the United States Department of Education for "state" administration expenses.

b. Pursuant to the Elementary and Secondary Education Act of 1965, the District of Columbia is provided funds to assist in supporting handicapped students placed in "state operated" programs, (i.e., regional full-time special education programs, citywide special education schools and programs, private day special education schools and programs and private and public residential facilities and programs. These students do not qualify to be counted for funding under EAHCA but qualify for all services and benefits accorded by EACHA. Funding in a given fiscal year is for the number of pupils in covered facilities/programs and counted 2 years previously. Thus, in FY 1981, $2,296,513 was provided for the 3,138 pupils counted on October 1, 1979; in FY 1982, $2,824,442 was provided for the 3,853 pupils counted on October 1, 1980; and in FY 1983, $2,668,445 was provided for the 3,853 pupils counted on October 1, 1981. Regardless of the cost of a private residential or other "special" day placement, the District approximately received, per pupil $731.83 in 1981, $733.05 in 1982 and $692.00 in 1983.

6. a. As of January 1, 1980, 240 handicapped children were in private residential facilities and entitled to a "free and appropriate education" under the EAHCA. It was projected that 20 additional children would be placed during the year. In 1981, as a result of new programs and facilities in the District, between 172 and 203 students were placed in private residential facilities. As of July 15, 1982, 168 students were so placed. As of January 27, 1983, 184 students were so placed.

b. In Fy 1980, the total cost for all 260 actual and expected students in private residential facilities was as follows: $3,409,700 (room and board); $1,754,675 (special education instruction); $117,768 (health care); and $19,880 (other), for a total of $5,301,933. The average placement cost was $20,392.05.

c. Cost of private residential placement, per pupil, range from approximately $10,000 a year at St. Gertrude School, Washington, D. C. (1980) to $23,000 a year at Concord School, West Virginia (1982), to $35,000 a year at the Avalon Center, Massachusetts (1982), to $40,000, $54,000, and $63,000 a year at The Brown School, Texas (1982), to $100,000 a year at Bradley Hospital, Rhode Island (1980).

7. To the end of securing additional funds for tuition for private facilities and programs, the District of Columbia sought and received from Congress supplemental appropriations in excess of $800,000 for FY 1980 and approximately $400,000 in FY 1981.

8. In addition to special education services, the benefits provided to those handicapped students placed in private residential facilities varies with the type of facility. Since some placements are in hospitals and other Acute Care Facilities, students so placed are receiving a program of medical treatment and habilitation. Those in Intermediate Care Facilities are receiving programs of custodial care and supervision and medical monitoring and habilitation and in some cases, programs of independent living. Generally, all students would receive room and board, basic twenty-four hour care and supervision, laundry, recreation, entertainment and emergency medical care.

/s/ DOUGLAS M. JACKSON

Subscribed and sworn to before me this 17th day of February, 1983, in Washington, D.C.

/s/ JOSEPH R. KINARD
Notary Public, D. C.

My Commission expires on: May 31, 1985

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA

SCHEDULE OF PROPOSED NONRESIDENT TUITION RATES FOR THE 1982-1983 SCHOOL YEAR

	I. Yearly Rate	II. Half-Yearly Rate	III. Daily Rate
Senior High Schools[1]	$1,510.00	$ 755.00	$ 8.00
Career Development Centers	2,300.00	1,150.00	12.50
Junior High Schools	1,583.00	791.50	8.75
Elementary Schools	1,741.00	870.50	9.50
Kindergarten and Pre-Kindergarten			
Full Day Session	1,044.00	522.00	5.75
Half-Day Session	522.00	261.00	3.00
Armstrong Adult Education Center			
Full Course (5 periods per day)	404.00	202.00	2.25
Less than 5 periods—rate per period	81.00	40.50	.50
Adult Education Non-Credit Courses			
Full Course (5 periods per day)	338.00	169.00	3.00
Less than 5 periods—rate per period	68.00	34.00	.50
Americanization School			
5 Hours per Day (Full time)	126.00	63.00	.75
3 Hours per Day (A.M.)	76.00	38.00	.50
2 Hours per Day (P.M.)	50.00	25.00	.25
Citizenship Course (6 weeks)	10.00		
Evening Schools			
Full Program (3 hrs. per night)	856.00	428.00	8.00
Two-thirds Program (2 hrs. per night)	571.00	285.50	5.00
One—third Program (1 hr. per night)	285.00	142.50	2.75
Special Education Programs			
Physically Handicapped & Other Health impaired	6,435.00	3,228.00	35.00
Emotionally & Socially Handicapped	3,435.00	1,717.50	18.75
Trainable Mentally Retarded	4,481.00	2,240.50	24.25
Learning Disabled/Educable Retarded	2,719.00	1,359.50	14.75
Visually Impaired			
Full-time Program	5,012.00	2,506.00	27.25
Part-time[2]	2,600.00	1,300.00	14.00
Hearing Impaired & Communication Disorders	3,321.00	1,660.50	18.00
Deaf/Blind	5,204.00	2,602.00	28.25
Visiting Instruction[3]			
D.C. Youth Orchestra Programs	225.00	112.50	1.25

ATTACHMENT I